

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 SUMMARY ORDER
5

6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL
7 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY
8 TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE
9 ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT
10 STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR
11 PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.
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13 At a stated term of the United States Court of
14 Appeals for the Second Circuit, held at the United States
15 Courthouse, Foley Square, in the City of New York, on the
16 10th day of August, two thousand and six.
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19 PRESENT: HON. DENNIS JACOBS,
20 HON. ROSEMARY S. POOLER,
21 Circuit Judges,
22 HON. EDWARD R. KORMAN*,
23 District Chief Judge.
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26 SAJIDA BANO, SUNIL KUMAR, DR.
27 STANLEY NORTON, DR. ASAD KHAN, SHIV
28 NARAYAN MAITHIL, DEVENDRA KUMAR
29 YADAV, and BHOPAL GAS PEEDIT MAHILA
30 UDYOG SANGATHAN, on behalf of
31 themselves and all others similarly
32 situated,
33

34 Plaintiffs,

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36 HASEENA BI,

37
38 Plaintiff-Appellant,

*The Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

1 QAMAR SULTAN, OHMWATI BAI, MADAN
2 SINGH ADBA BEE, BALDAR HUSSAIN,
3 NOOR MOHAMMED, SYED RAHMAN, PHUL
4 SINGH, ZAMEEN MIYAN, BANO BEE,
5 MEENU RAWAT, MANTU CHAURSIA and
6 MAKSOOD AHMED and RAM CHAR
7 PRAJAPATI,

8
9 Movant-Appellants,

10
11 -v.-

05-6082

12
13 UNION CARBIDE CORPORATION and
14 WARREN ANDERSON,

15
16 Defendants-Appellees.

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18 - - - - -X

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21 APPEARING FOR PLAINTIFF-
22 APPELLANT AND MOVANTS-
23 APPELLANTS:

RICHARD S. LEWIS (Matthew
K. Handley, Reena
Gambhir, on the brief),
Cohen, Milstein, Hausfeld
& Toll, P.L.L.C.,
Washington, D.C.; (Curtis
V. Trinko, Law Offices of
Curtis V. Trinko, LLP,
New York, New York, on
the brief).

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34 APPEARING FOR APPELLEES:

WILLAIM A. KROHLEY,
(William C. Heck on the
brief), Kelley Drye &
Warren, LLP, New York,
New York.

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40 Appeal from the United States District Court for the
41 Southern District of New York (Keenan, J.).
42

43 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,
44 ADJUDGED AND DECREED that the judgment of the district
45 court be AFFIRMED.

1
2 Plaintiff Haseena Bi and fourteen would-be
3 intervenors appeal from the October 5, 2005 order and
4 decision of the United States District Court for the
5 Southern District of New York (Keenan, J.), denying the
6 motions for class certification and for intervention of
7 additional class representatives, and dismissing Bi's
8 action in its entirety. Bano v. Union Carbide Corp., No.
9 99 Civ. 11329 2005 U.S. Dist. LEXIS 22871 (S.D.N.Y. Oct.
10 5, 2005). Bi's action arises from property damages
11 allegedly suffered by Bi and persons similarly situated
12 as a result of exposure to water contaminated by
13 chemicals released from a chemical plant site operated in
14 Bhopal in 1969-1984 by a subsidiary of defendant Union
15 Carbide Corp. ("Union Carbide"). Familiarity is assumed
16 as to the facts, the procedural context, and the
17 specification of appellate issues.

18 1. Dismissal of Bi's claims for property damages
19 was proper. That defendants did not specifically move
20 for dismissal is not a ground for reversal. See Wachtler
21 v. County of Herkimer, 35 F.3d 77, 82 (2d Cir. 1994).
22 The Amended Complaint does not allege that Bi is an owner
23 or legal tenant on any property contaminated by leakage
24 from the chemical plant site; nor did Bi contest the
25 Magistrate Judge's finding that she is not a property
26 owner despite an opportunity to do so before the
27 Magistrate Judge and before the district court. Although
28 the Magistrate Judge ultimately ruled on a ground that
29 did not depend on that finding, the finding itself was
30 available to the district judge to support a ruling on
31 another or alternative ground, and Bi was obliged to
32 contest it if she wished that it not bind her. In any
33 event, the record reflects that Bi resides illegally on
34 government-owned ground. She therefore cannot sustain
35 claims for trespass or private nuisance under New York
36 law. See Bano v. Union Carbide, 361 F.3d 696, 707 (2d
37 Cir. 2004) (holding that New York law applies to Bi's
38 action). Bi's claim for public nuisance likewise fails
39 because Bi has not alleged any special injury or damages
40 "beyond that of the general inconvenience to the public
41 at large." See Leo v. Gen. Elec. Co., 145 A.D. 2d 291,
42 294 (N.Y. App. Div. 1989).

1 2. The district court did not abuse its discretion
2 in refusing to reinstate Bi's claims for remediation of
3 the chemical plant site and the groundwater beneath it.
4 See Lemon v. Kurtzmann, 411 U.S. 192, 200 (1973) ("In
5 shaping equity decrees, the trial court is vested with
6 broad discretionary power; appellate review is
7 correspondingly narrow."). We have already affirmed
8 dismissal of these claims because of the impracticality
9 of a court-supervised clean-up project on land owned by a
10 foreign sovereign. See Bano v. Union Carbide Corp., 361
11 F.3d 696, 716-17 (2d Cir. 2004). Although "the law of
12 the case doctrine does not deprive an appellate court of
13 discretion to reconsider its own prior rulings, even when
14 the ruling constituted a final decision in a previous
15 appeal, we do not revisit such a final decision absent
16 cogent or compelling reasons[.]" SCS Commc'ns, Inc. v.
17 Herrick Co., 360 F.3d 329, 336 (2d Cir. 2004) (internal
18 citation and quotation marks omitted) (quoting Rezzonico
19 v. H&R Block, Inc., 182 F.3d 144, 149 (2d Cir. 1999)).
20 There is no such reason here. The Consul General of
21 India submitted a letter stating that the Madhya Pradesh
22 State government and the Union of India welcome any
23 relief for remediation of the chemical plant site; but
24 that letter does not obviate any of the sensitive and
25 severe difficulties identified by the district court and
26 by this court regarding the administration of remediation
27 of land owned by a foreign sovereign in its own country.

28 3. The district court properly denied the motion
29 for class certification because the only relief sought by
30 the class related to the claims for relief that had been
31 dismissed as impracticable. As the district court
32 observed, any clean-up of the aquifer or groundwater
33 would affect the public generally and could not be
34 undertaken without the permission and supervision of the
35 Indian government. See Bano, 2005 U.S. Dist. LEXIS
36 22871, at *9 ("Even if the aquifer could be cleaned by an
37 offsite pump, this claim does not involve an injunction
38 with regard to property owned by Bi or remediation of
39 individual properties."). Yet, India has indicated
40 (understandably) that it would control such a process;
41 thus the same problems (lack of control and potential
42 conflict with the Indian authorities) are inherent in any
43 attempt to clean-up the aquifer and groundwater as were

1 present in the claims for remediation of the chemical
2 plant site.²

3 4. The intervenors failed to object to the
4 Magistrate Judge's Report and Recommendation. They thus
5 waived their right to judicial review. See Frank v.
6 Johnson, 968 F.2d 298, 300 (2d Cir. 1992). Moreover,
7 even were judicial review available, the intervenors have
8 failed to allege any claims for individual property
9 damage.

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11 For the foregoing reasons, the judgment of the
12 district court is **AFFIRMED**.

13 FOR THE COURT:
14 ROSEANN B. MACKECHNIE, CLERK
15 By:

16 _____
17 Lucille Carr, Deputy Clerk

²In light of our ruling, we do not reach the issue of whether the district court also properly denied the motion for class certification on the ground that Bi is an inadequate class representative.